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In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

For many years most States have imposed certain requirements on interstate motor carriers operating within their borders. States often require carriers to file copies of operating authorities issued by the

Interstate Commerce Commission, require vehicles to be registered with and by State authorities and identified in a certain manner, and require the filing of evidence of insurance and designations of local agents for service of process. Because these "registration" requirements vary from State to State, producing a burden on the carriers, efforts have been made in recent years to standardize them.

In 1965 Congress enacted Public Law 89-170 (79 Stat. 648), Section 2 of which is now Section 202 (b)(2) of the Interstate Commerce Act (49 U.S.C. 302(b)(2)). Under Section 202(b)(2) uniform standards for state registration of Commission-issued certificates of public convenience and necessity and permits are proposed by the "national organization of the State Commissions" (appellant in this case) and promulgated by the Commission. Any state requirements more burdensome than the uniform standards are deemed to constitute an "undue burden on interstate commerce."

Appellant proposed initial standards in 1966. The Commission promulgated the standards forthwith, to become effective five years thereafter, as the statute required. Amendments to the standards have been adopted under the same procedure. The standards are codified at 49 C.F.R. Part 1023.

In August 1973 the Commission issued a notice of proposed rulemaking (38 Fed. Reg. 23979) calling for the revision of state procedures for registration of temporary authorities. The Commission observed that various state practices were hampering the

rapid commencement of urgently required carrier services for which it had given temporary authority. The Commission discussed the existing requirements of 49 C.F.R. 1023.11 [1] and noted certain problems and inconsistencies in the States' interpretations and applications of those requirements. To meet these problems the Commission proposed the rule that has been challenged in this proceeding.

Under Part II of the Interstate Commerce Act (49 U.S.C. 301 *et seq.*), no for-hire motor carrier of passengers or property (with certain exceptions not relevant here) may conduct interstate operations without permission. The Commission is authorized to give permission in three ways: (1) in the case of a permanently licensed common carrier, by a "certificate of public convenience and necessity" issued under 49 U.S.C. 307; (2) in the case of a permanently licensed contract carrier, by a "permit" issued under 49 U.S.C. 309; and (3) in the case of a temporarily licensed carrier of either type, by a "temporary authority" issued under 49 U.S.C. 310a(a). See *United States* v. *Garner*, 134 F. Supp. 16, 19 (E.D. N.C.).

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[1] 49 C.F.R. 1023.11 provides that temporary authorities of 30 days or less duration need not be registered if the carrier involved:

> (a) Registered its other authority and identified its vehicles or driveaway operation under the provisions of these standards; and (b) furnished to the State commission a telegram or other written communication describing such emergency or temporary operating authority and stating that operation thereunder shall be in full accord with the requirements of these standards.

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Such temporary authorities are summarily issued to meet "immediate and urgent transportation needs." Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538. Unlike certificates and permits, temporary authorities are not issued after full adjudicatory proceedings, but rather are granted after the summary standards of Section 310a(a) have been met—standards that allow issuance of such authority without hearings or other proceedings.

When it adopted the proposed rule (J.S. App. 11a-23a; 119 M.C.C. 327) the Commission concluded that the procedures described in Section 202(b)(2) apply only to "certificates of public convenience and necessity" and "permits," and do not apply to "temporary authorities" granted under Section 310(a) of the Interstate Commerce Act (J.S. App. 16a). The Commission also discussed at some length the need for the new rule. It observed that state registration procedures and delays have been a frequent cause of informal carrier complaints and that there is a need for consistency in the implementation of newly-granted temporary authorities (J.S. App. 17a). Finally, the Commission noted that many States appear to maintain regulations and practices in violation of the uniform standards of Part 1023. The Commission cautioned against the continuation of such practices and requested the cooperation of the state commissions in eliminating them (J.S. App. 18a).

On review, the three-judge district court unanimously sustained the Commission's decision (J.S. App. 1a-10a; 397 F. Supp. 591), holding that "the

Commission's position is the correct one" because Section 202(b)(2) is "clear and unambiguous in its use of the precise terms of 'certificates' and 'permits'" (J.S. App. 7a). Upon reviewing the legislative history of the Section, the court found no "persuasive evidence that Congress intended other than what is stated and made clear in wording this statute" (*ibid.*). The district court also held that the Commission's action was supported by the record; accordingly, it upheld the Commission and dismissed the complaint.

ARGUMENT

The regulations at issue in this case were promulgated by the Commission pursuant to its powers under Section 310a(a) of the Interstate Commerce Act. The Commission determined, in effect, that because compliance with the many and complicated state registration requirements could be quite difficult and time-consuming, those requirements were interfering with the Commission's ability to issue short-term temporary authorities. The more complex and time-consuming the state requirements, the less effective the Commission's temporary authorities will be. The Commission therefore preempted state registration requirements, to the extent those requirements applied to temporary authorities of less than 90 days' duration.

1. The foundation of appellant's arguments is that the Commission's regulations cannot preempt state requirements unless Congress has expressly conferred

upon the Commission the power to issue regulations with a preemptive effect. This proposition is incorrect. This Court has held that federal regulations, authorized by law, preempt conflicting state law and regulations. *Free* v. *Bland*, 369 U.S. 663. There need not be a separate congressional grant of a "power to preempt." The power to issue licenses to engage in interstate commerce necessarily includes the power to supersede state regulations and laws that may frustrate or impede the exercise of rights conferred by the federal license. *Shreveport Rate Cases*, 234 U.S. 342. The purpose of Section 310a(a) was "to provide the Commission with a swift and procedurally simple ability to respond to urgent transportation needs." *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539. The inconvenience and delay caused by state registration procedures regarding temporary authorities are inconsistent with this mandate, and the Commission is empowered to displace them.

The cases relied upon by appellant to support its assertion that preemption is not favored (J.S. 10-12, 21-24) deal with quite different matters. Some of the cases (see, *e.g.*, *Fry Roofing Co.* v. *Wood*, 344 U.S. 157) deal with the question whether state regulation of commerce is preempted when Congress has passed no pertinent law or when a federal agency, although authorized to act, has elected not to do so. In other words, these cases deal with preemption because of the nature of the subject matter, even when the federal government has declined to exercise its

authority. This is not such a case—here Congress and the Commission have exercised their authority, and appellant attacks the validity of that exercise. Other of the cases (see, *e.g.*, *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349) deal with the question whether Congress has authorized an administrative agency to regulate *intra*state commerce. Again, this is not such a case—here the Commission's regulation pertains only to temporary authority to engage in interstate motor transportation, and the Commission's power to bestow such authority is clearly conferred by Section 310a(a).

2. We submit, therefore, that the Commission's regulations preempt inconsistent state registration requirements unless Section 202(b)(2) limits the Commission's power in this regard. Although appellant argues vigorously that, under Section 202(b)(2), only it can propose new regulations with respect to state registration requirements, appellant's argument is not supported by the statutory language. Section 202(b)(2) gives appellant the power to initiate regulation of state registration requirements for "certificates of public convenience and necessity" and "permits." The Commission retains the power to initiate regulation of state requirements concerning temporary authorities.

The terms "certificate of public convenience and necessity" and "permit," each of which appears five times in Section 202(b)(2), have definite meanings —both terms are defined in the Act in specific ways. See page 3, *supra*. Both denote *permanent* oper-

ating authority.[2] The Commission's temporary authority regulations, in effect since 1965, also recognize that a temporary authority is neither a certificate nor a permit.[3] See also *United States* v. *Garner*, 134 F. Supp. 16, 19 (E.D. N.C.).

Appellant's assertion that, for purposes of Section 202(b)(2), the terms "certificate" and "permit" must be construed to include temporary authorities is supported only by a contention that Congress did not clearly demonstrate an intention to exclude temporary authorities from the scope of the Section. But the terms of the statute use highly specific and time-tested words of art and are not contradicted by the legislative history; as the district court observed (J.S. App. 7a), there is no "persuasive evidence that Congress intended other than what it stated and made clear in wording this statute." Appellant should seek relief from Congress if it believes that it, rather than the Commission, should have the power to

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[2] Section 206(a)(1) (49 U.S.C. 306(a)(1)) states that no common carrier may operate without a certificate "[e]xcept as otherwise provided in this section and in section [310a]," thereby indicating that a "temporary authority" is not a "certificate." A similar provision exists in Section 209(a)(1) (49 U.S.C. 309(a)(1)) with respect to contract carrier "permits."

[3] 49 C.F.R. 1131.4(a)(2) provides in part: "While a grant of temporary authority is neither a permit nor a certificate under the Interstate Commerce Act it nevertheless enables the applicant to provide service either as a common or a contract carrier, as the case may be."

initiate rulemaking with respect to state registration of "temporary authorities."[4]

3. Appellant finally contends that the Commission's decision is arbitrary and unsupported. The district court, after reviewing the record, concluded that "there is ample evidence in the record, from the comments submitted by several States, of variations in notification procedures previously required by the States, and this is intertwined with the general problem of delay" (J.S. App. 9a-10a). The court observed that "the validity of the action of the Commission would not seem to depend upon proof of finding of any specified number of days of delay," and held that the objective of the rule—to achieve more expeditious commencement of carrier services —"is not without rational support" (*ibid.*). There is no occasion for plenary review of such essentially factual issues.

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[4] Appellant correctly observes (J.S. 17) that the regulations it certified to the Commission in 1966, and which the Commission promulgated, included a section dealing with temporary authorities. It was advantageous for all concerned for the States, through appellant, to agree upon such procedures and embody them in a single set of rules without the need for the Commission to exercise the powers it now has exercised. That an amicable resolution was possible in 1966 does not preclude the Commission from taking the course that now has become necessary to safeguard its ability effectively to issue temporary authorities.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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